FOR ARGUMENT

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-383

F. W. STANDEFER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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I.

STATEMENT OF FACTS

The Government has again misstated the plea of guilty entered by Gulf Oil Corporation to the indictment. Footnote 1, page 3 of the Government brief, indicates that Gulf pleaded guilty to all

counts of the indictment. The docket entries in this case establish as a fact that on November 22, 1977 Gulf Oil Corporation pleaded guilty to counts 2, 4, 7 and 9. The docket entry for that date also indicates that on the Government's own motion, counts 1, 3, 5, 6 and 8 were dismissed. The counts of the indictment dismissed as to Gulf involve three of the counts of which Niederberger had been acquitted.

In its recitation of facts, the Government refers to the testimony of Harold Levin to the effect that the dates of the golf trips often coincided with important dates in the administration of the Gulf audits. (Government brief, p. 7) The entire testimony of this witness, on direct and cross-examination, appears at transcript pages 372 through 506. The cross-examination established that the witness took the date of a trip alleged in the indictment and then tried to relate it back to some act by the audit team of Gulf Oil Corporation. (Tr. pp. 410, 419, 420) It was also established that the large case teams were composed of specialists such as three engineers, a national examiner and two regular revenue agents in addition to a coordinator. (Tr. 431) The international oil pricing problems were handled by the international examiner located in Manhattan. (Tr. 433) As many as seven men worked on the Gulf audits and

devoted 1373 man days to one audit. (Tr. 441) Eleven revenue agents audited the years 1960-1961 and devoted 2596 man days. (Tr. 447) The audits were reviewed by a review staff. (Tr. 449) Similar testimony is provided throughout the cross-examination of this witness, including the travels of revenue agents from other parts of the country in connection with the audits of Gulf Oil. (Tr. 454-455) Everyone working on the Gulf audit team was a competent I.R.S. agent, performing the tasks assigned to him. (Tr. 489, 490) The recitation of the witness relating to the Bahamas Ex Report has no relevancy to Mr. Standefer since Mr. Standefer in no way participated in the preparation of that report. This was established by the testimony of Attorney Thomas Wright. (Tr. 569) It was also established that the Bahamas Ex Report was investigated by the Watergate special prosecutor's office, the Senate of the United States and did not result in any different action than that recommended in the so-called Bahamas Ex Report.

It is necessary to review the entire 1160 pages of the transcript of the trial to secure the full prejudicial impact of the Government of the United States trying Gulf Oil, who was already out of the case on its plea of guilty, rather than F.W. Standefer. The basic issue ultimately to have been

decided by the jury was whether under § 201(f) the golf trips described in the indictment were provided "for or because of any official act performed or to be performed" by Cyril J. Niederberger. The jury also was required to determine whether the golf trips represented fee, compensation or reward for the "performance of any duty" by Cyril J. Niederberger. 26 U.S.C. § 7214(a)(2).

II.

LEGISLATIVE INTENT RE 18 U.S.C. § 2

Since Standefer was not a government employee he could not be indicted under 26 U.S.C. § 7214(a)(2) as a principal. He could only have been indicted as an aider and abettor. In its argument, at page 27, the Government seems to argue that the congressional legislative intent in 1909 abolished the common-law procedural bar of the acquittal of a principal to the later conviction of an aider and abettor. A review of the cases would indicate a conflict in jurisdictions, some of which did not adopt the illogical result of allowing an accessory before the fact to be convicted after the only named and potential principal had been acquitted of the substantive crime. The inapplicability of case precedent to legislative intent should be apparent from the fact that all of

the cases cited by the Government involve common-law crimes in which the aider and abettor could be, under the facts, a principal. As Judge Aldisert noted in his dissent (Petition for Certiorari, App. A, 42a):

> "Furthermore, it is a crime to receive a gratuity under 26 U.S.C. § 7214(a)(2) only if the gratuity is received by a federal revenue agent in his official capacity. Not being a federal agent, Standefer could not have been indicted as a principal as a matter of statutory definition."

It is in this context of a statutory crime in which the principal is a defined person that takes a great deal of convoluted reasoning to sustain the conviction of an aider and abettor as a principal when he could not have been indicted as a principal and cannot, factually or as a matter of law, be a principal. The legislative history or prior decisional law does not address this narrow issue. In People v. Wyherk, 347 Ill. 28, 178 N.E. 890 (1930), at 347 Ill. 33, the court held:

> "A statute providing that an accessory before the fact may be indicted and convicted of a substantive felony whether the principal has or has not been convicted, or is or is not amenable to justice, removes the common law requirement of a prior or simultaneous

> conviction and sentence of the principal but has no application to a case in which the principal has been tried and acquitted."

The entire legislative history in the argument of the Government relates to the fact that accessories before the fact can be dealt with as principals. The elimination of procedural bars to prosecution of an aider and abettor because the principal could not be found or was not prosecuted was the procedural bar to which the legislation was addressed. The cases in which the court discussed the guilt of an aider and abettor as a principal regardless of the conviction or acquittal of the principal are cases in which the two defendants acted in concert in the commission of a crime where either could have committed the crime as a principal. They are not precedent for a case as here where Standefer could not be indicted as a principal for violation of 26 U.S.C. § 7214(a)(2). Niederberger is the only identified and named principal who could be indicted under that section. The legislative history relating to the amendment in 1951 relates to making an aider and abettor punishable as a principal in cases where he could not be indicted as a principal. That is all the 1951 amendment

intended to do.[1/]

The citation of the Model Penal Code in footnote 13 and reliance by the majority of the Court of Appeals is misplaced since the Commentary to the Model Penal Code indicates it is recommended as a change from the present status of the law -- then 1953 -- a change which Congress to this date has not yet adopted. This issue is further discussed in petitioner's brief at page 28.

III.

STRICT CONSTRUCTION OF CRIMINAL STATUTES

The Government, at page 20 of its brief, attempts to refute the application of the rule of lenity in the construction of § 2, 18 U.S.C. Mourning v. Family Publication Service, Inc., 411 U.S. 356, is cited for the proposition that:

1/ In this context the holding in United States v. Bass, 404 U.S. 336, is apposite:

> "Not wishing 'to give point to the quip that only when legislative history is doubtful do you go to the statute,' we begin by looking to the text itself."

> "Penal statutes are construed narrowly to insure that no individual is convicted unless 'a fair warning' [has first been] given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed."

This quote is taken from McBoyle v. United States, 283 U.S. 25 (1931), which was a criminal case, unlike Mourning, which was a civil case. Justice Holmes, in McBoyle, in the next sentence following that quoted by the Government, held:

> "To make a warning fair, so far as possible the language should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon speculation that if the legislature had thought of it, very likely broader words would have been used." (Emphasis added)

The judgment of conviction of transporting aircraft was thus reversed by this Honorable Court.

Chief Justice Marshall, in United States v. Wiltberger, 5 Wheat. 76, at page 95, held that "the tenderness of the law for the rights of individuals" entitles each person to an unequivocal warning that he is within the class of persons subject to criminal liability.

Kraus and Brothers, Inc. v. United States, 327 U.S. 614 (1946), is also cited in the Mourning case. In Kraus, Your Honorable Court held:

> "And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language."

It is interesting that the Government has not attempted to address the cases cited at page 9 of petitioner's brief which relate to cases where the principal and the aider and abettor are tried jointly and in which the judge has charged the jury that where the only named and potential principal is acquitted, a jury cannot convict an aider and abettor.

IV.

LEGISLATIVE HISTORY OF 18 U.S.C. § 201(f) RE INTENT

The Government in its brief has assumed that the court below properly instructed the jury not to consider the fact that Gulf Oil incurred an additional $150 million in tax liability as the result of the I.R.S. audits on the issue of the intent of Standefer for violation of either § 201(f) or § 7214(a)(2). The issue was raised to the trial court that the assessments against Gulf Oil created a factual matter for a jury to determine whether the golf trips constituted

anything of value to Niederberger for the performance of his duty or for or because of an official act performed or to be performed by him.

The legislative history of § 201(f) would indicate it was not a malum prohibitum interdiction. After lengthy hearings before many sessions of Congress, a House report, H.R. Rep. No. 748, 87th Cong., 1st Session, 1961, regarding § 201(f) stated:

> "Subsections (f), (g), (h), (i). -- These subsections adopt the policy of five of the nine present general bribery sections (205, 206, 207, 208 and 210). They forbid offers, payments, solicitations, and receipt of things of value 'for or because of' the recipient's past or future 'official acts'." House Report, supra, at 19.

During the Senate hearing on H.R. 8140, Senator Keating noted that:

> "the [House] bill provides no prohibition against the acceptance of gifts."

and he proposed legislation to close this "loophole". Hearings on H.R. 8140 Before the Senate Comm. on the Judiciary, 87th Cong., 2d Sess. 8 (1962). At pages 9 and 10 of the Senate hearings, Senator Keating proposed the amendment to bar gifts if the employee had reason to believe the donor would not have given the gift but for the employee's position or from those

having business relations with the employee's agency. Attorney General Katzenbach, at the Senate hearings, page 25, indicated that the general prohibition restricting the receipt of gifts was principally a matter of individual agency regulation and he recommended against the Senator Keating proposal. Senator Keating's proposal to regulate gifts was not adopted by the Senate Judiciary Committee.

The "for or because of" language used in § 201(f), the original staff report would indicate, was aimed at rewards for an official act. Staff Report to Subcommittee No. 5 of the Committee of the Judiciary, Federal Conflict of Interest Legislation, 85th Cong. (1958).

In United States v. Brewster, 408 U.S. 501 (1972), Your Honorable Court reversed a district court demurrer and remanded the case for trial, stating that the indictment alleging bribery under § 201(c) and receipt of a gratuity under § 201(g) involved questions of fact for a jury. On remand, Senator Brewster was convicted of the gratuity section (g) and acquitted of the bribery section. On appeal, in United States v. Brewster, 506 F.2d 62 (C.A. D.C. 1974), the conviction under § 201(g) was reversed by reason of the erroneous charge of the trial court. The court of

appeals held:

> "The likelihood of misunderstanding because of failure at this point to distinguish between criminal and innocent acceptance of funds was enhanced by the very next sentence of the instruction on the lesser included gratuity offense; 'There need not be proof, however, that there was any corrupt intention on the part of defendant Brewster to be influenced in the performance of an official act.' Did this instruction rule out any criminal intent whatever under the lesser included gratuity offense? However ill-defined it may be in the exact words of the statute, there is and must be a general criminal intent on the part of the defendant to support a conviction under the gratuity section (g)." 506 F.2d at 82.

The court further held in distinguishing the bribery section from the gratuity section:

> "In contrast under the gratuity section, 'otherwise than as provided by law . . . for or because of any official act' carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, i.e., 'with knowledge that the donor was paying him compensation for an official act . . . evidence of the member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient . . .".

The court of appeals also cautioned the Government that the confusion in the charge was due to the fact that the Government insisted in proceeding under subsection (c), bribery, as well as subsection (g), gratuity, and that it would be safer for the Government on remand to go to the jury under one or the other of the sections, but not on both, since it is almost impossible for a trial judge not to confuse the jury in its instructions on both sections. The same observation is apposite when the Government has chosen to indict under 26 U.S.C. § 7214(a)(2) and § 201(f) and the confusion was alluded to by the trial court when attempting to answer the jury's inquiry on intent (A., p. 81a).

V.

ERRONEOUS INSTRUCTIONS ON INTENT

In view of the legislative history of § 201(f) and the erroneous instructions as they would relate to § 7214(a)(2), the case in the court below is similar to that of Bollenbach v. United States, 326 U.S. 607 (1946). There the trial court, as in the case sub judice, after the jury had been out for several hours was requested to give additional instructions. The trial court in Bollenbach misstated the law on presumptions as the trial court in the case sub judice

misstated the law on intent and the irrelevancy of the correctness of the returns. Your Honorable Court held:

> "But precisely because it was a 'last-minute instruction' the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were 'hopelessly deadlocked' after they had been out seven hours . . . Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge." (Emphasis added)

Your Honorable Court further held, at page 613, that:

> "A conviction ought not to rest on an unequivocal direction to the jury on a basic issue."

and finally, at page 615, Your Honorable Court concluded:

> "In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however, justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

Counsel had repeatedly requested that the Government not proceed on § 7214(a)(2) and § 201(f) but make an election. This was the safer course suggested by the Court of Appeals for the District of Columbia in United States v. Brewster, supra. The instructions of the court on the specific issue of intent as those instructions were requested by the jury was misleading and eliminated the crucial factual issues for the defense from the consideration of the jury.

For the reasons hereinabove suggested, the three counts of the indictment should be dismissed and, in view of the incorrect charge of the trial court to which specific exception was taken, the prejudice to the petitioner can only be corrected by the remand for a new trial.

Respectfully submitted,

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